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MEDICAL MALPRACTICE/CIVIL PROCEDURE—TRAP FOR THE UNWARY: THE 2005 AMENDMENTS TO CONNECTICUT'S CERTIFICATE OF MERIT STATUTE

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NOTES

MEDICAL MALPRACTICE/CIVIL PROCEDURE—TRAP FOR THE UNWARY: THE 2005 AMENDMENTS TO CONNECTICUT'S CERTIFICATE OF MERIT STATUTE

> *A "case should not be decided solely on the basis of the literal meaning of a word. . . . When that meaning has led to absurd or futile results, . . . this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words."*[1]

INTRODUCTION

In February 2003, Lawrence Santorso was a patient at Bristol Hospital in Bristol, Connecticut, receiving treatment for pancreatitis[2] and undergoing surgery on his gallbladder and pancreas.[3] During a routine x-ray, a fifteen-millimeter nodule was discovered in his lungs.[4] Radiologists reviewed the images and noted in three separate reports that further examination was necessary.[5] The reports were added to Santorso's file and sent to the physicians who were responsible for his treatment.[6]

In 2005, Santorso was admitted to Veterans Affairs Hospital in West Haven, Connecticut, for treatment of osteomyelitis[7] and an

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1. Rios v. CCMC Corp., 943 A.2d 544, 553 (Conn. App. Ct. 2008) (dissenting opinion) (second omission in original) (quoting Simonette v. Great Am. Ins. Co., 338 A.2d 453, 457 (Conn. 1973) (Bogdanski, J., dissenting)); *see also* United States v. Am. Trucking Ass'ns, Inc., 310 U.S. 534, 543 (1940) (originating this general interpretation of the plain meaning rule).

2. Pancreatitis is "inflammation of the pancreas." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 894 (11th ed. 2004) [hereinafter WEBSTER'S].

3. Santorso v. Bristol Hosp., 42 Conn. L. Rptr. 724, 724 (Conn. Super. Ct. 2007).

4. *Id.*

5. *Id.*

6. *Id.*

7. Osteomyelitis is an infection of the bone. *See* WEBSTER'S, *supra* note 2, at 878.

ulceration of his heel.[8] In June 2005, during the course of treatment, Santorso's physician ordered a chest x-ray.[9] This x-ray uncovered the same mass that had been discovered in 2003.[10] As a result, the physician obtained Santorso's records from Bristol Hospital.[11] A pathology report revealed that Santorso had malignant, metastatic squamous cell carcinoma—lung cancer.[12] Subsequent reports revealed that not only had the masses enlarged during the intervening two years, but the cancer also had metastasized outside his lungs to his lymph nodes and surrounding tissues.[13] Santorso died as a result of his lung cancer on September 17, 2007.[14]

Before his death, Santorso filed a medical malpractice complaint against Bristol Hospital and the physicians who treated him.[15] On July 5, 2006, the defendants filed a motion to dismiss on the grounds that Santorso failed to comply with General Statute of Connecticut section 52-190a. This statute, as amended in 2005, requires anyone filing a medical malpractice claim to make

> a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. The complaint . . . shall contain a certificate of the attorney or party filing the action . . . that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant . . . . To show the existence of such good faith, the claimant or the claimant's attorney . . . shall obtain a written and signed opinion of a similar health care provider . . . that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion.[16]

Failure to include the documentation required under section 52-190a "*shall be grounds* for the dismissal of the action."[17]

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8. *Santorso*, 42 Conn. L. Rptr. at 724.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. Obituary, *Lawrence Santorso*, THE BRISTOL PRESS, *available at* http://www.bristolpress.com/articles/2007/09/18/obituaries/18826882.prt (last visited Apr. 15, 2009).

15. *Santorso*, 42 Conn. L. Rptr. at 724. These facts seem to factually support a claim for loss of chance of life. *See* Turner W. Branch, *Misdiagnosis of Cancer and Loss of Chance*, *in* 30 AM. JUR. *Trials* §§ 237, 248 (1983) (stating that "if the defendant physician destroyed the victim's chance of survival, however remote, he is held liable").

16. CONN. GEN. STAT. § 52-190a(a) (2007).

17. *Id.* § 52-190a(c) (emphasis added).

Santorso admitted that he failed to attach these documents to his complaint, and he filed a memorandum in opposition to defendants' motion, attaching the required certificate and opinion.[18] Although Santorso's complaint was not dismissed,[19] other complaints with similar flaws have met a much different fate.[20]

Connecticut courts have not been uniform in interpreting the statute. They have divided on the issue of whether claims that fail to include the required documentation should be dismissed.[21] Many courts take the position that the required good faith certificate and written opinion are prerequisites to a trial court's exercise of subject matter jurisdiction.[22] As a result, these courts hold, all complaints lacking these documents must be dismissed because the jurisdictional hurdle formed by the statute bars amendment. Other courts take the position that potentially meritorious claims should not be dismissed because of failure to comply with hyper-technical,

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18. *Santorso*, 42 Conn. L. Rptr. at 724. The Certificate of Reasonable Inquiry that must be included states:

> I hereby certify that I have made a reasonable inquiry, as permitted by the circumstances, to determine whether there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. This inquiry has given rise to a good faith belief on my part that grounds exist for an action against each named defendant.
>
> I have obtained a written, signed opinion of a similar health care provider, as defined in C.G.S. Sec. 52-184c, that there appears to be evidence of medical negligence, and detailing the basis for the formation of that opinion. I have retained the original, signed opinion, and have attached a copy thereof hereto, with the name and signature of the similar health care provider expunged, as provided by C.G.S. Sec. 52-190a(a).

2 JOEL M. KAYE & WAYNE D. EFFRON, CONN. PRACTICE SERIES: CIV. PRACTICE FORMS 101.13 (4th ed. Supp. 2008). This form must be signed by the attorney or the party filing the action.

19. *Santorso*, 42 Conn. L. Rptr. at 724.

20. *See infra* Part I.C.2.

21. *See* Landi v. Wertheim, No. CV065001608S, 2006 WL 2949103, at *2 (Conn. Super. Ct. Oct. 2, 2006) (noting the split in authority as to whether failure to include the required certificate implicates the court's subject matter jurisdiction).

22. *See* Peloso v. Walgreen E. Co., Inc., 42 Conn. L. Rptr. 838, 840 (Conn. Super. Ct. 2007); Landry v. Zborowski, 44 Conn. L. Rptr. 56, 58 (Conn. Super. Ct. 2007), *vacated in part by* Landry v. Zborowski, No. TTDCV076000211S, 2007 WL 4105519 (Conn. Super. Ct. Oct. 26, 2007) (vacating on reargument part of the original decision to dismiss the entire complaint on the grounds that one count of the complaint sounded in informed consent, not medical malpractice, and thus that count should not have been dismissed); Kirkpatrick v. New Britain Gen. Hosp., 42 Conn. L. Rptr. 519, 520 (Conn. Super. Ct. 2006); Mastrone v. St. Vincent's Med. Ctr., 41 Conn. L. Rptr. 375, 376 (Conn. Super. Ct. 2006); Kudera v. Ridgefield Physical Therapy, LLC, No. DBDCV065000993S, 2006 WL 2773651, at *1 (Conn. Super. Ct. Sept. 18, 2006); Andrikis v. Phoenix Internal Med., 41 Conn. L. Rptr. 222, 225 (Conn. Super. Ct. 2006).

though well-intentioned, pleading rules.[23] These courts hold that the plain language of the statute does not compel dismissal of these complaints.[24] Instead, the statute grants discretion to the courts to determine whether the complaint should be dismissed.[25]

Though this statute was passed as a means to combat a perceived medical malpractice crisis by preventing the filing of frivolous claims,[26] the solution to the problem, if one exists, is not mandatory dismissal of claims for a deficiency in pleading. This is too draconian a remedy for a problem that may not even exist. Further, even if there is a need to affirmatively prevent frivolous lawsuits, mandating dismissal of *all* claims that lack the required documents unfairly limits access to justice and undermines the goals of the tort system.

Part I of this Note provides a description of the evolution of section 52-190a. This Part explores prior interpretations, the legislative history of the 2005 amendments, and how those amendments have been interpreted by the Connecticut trial courts. This Part also explores the laws of other states that have chosen to address their perceived medical malpractice crises through heightened pleading laws. Part II begins by interpreting the statute, both the plain language, and the legislative history. These sections conclude that both the statutory language and its legislative history do not reflect an intent to mandate dismissal of deficient complaints. Part III begins by considering issues of public policy. First, the statute is examined in light of Connecticut's goal of ensuring that cases are resolved on their merits, rather than dismissed on procedural

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23. *See Santorso*, 42 Conn. L. Rptr. at 726 (holding that failure to include the required certificate is a curable deficiency); *see also* Greer v. Norbert, 42 Conn. L. Rptr. 806, 808 (Conn. Super. Ct. 2007); Donovan v. Sowell, 41 Conn. L. Rptr. 609, 613 (Conn. Super. Ct. 2006).

24. *See, e.g.*, *Santorso*, 42 Conn. L. Rptr. at 726.

25. *See infra* Part I.C.I.

26. *See* Bruttomesso v. Ne. Conn. Sexual Assault Crisis Servs., Inc., 698 A.2d 795, 802 (Conn. 1997) ("The purpose of the legislation is to inhibit a plaintiff from bringing an inadequately investigated cause of action, whether in tort or in contract, claiming negligence by a health care provider."). Many debate whether the United States actually is in the midst of a medical malpractice crisis. *Compare* Lindsay J. Stamm, *The Current Medical Malpractice Crisis: The Need for Reform to Ensure a Tomorrow for Oregon's Obstetricians*, 84 OR. L. REV. 283, 283 (2005) (arguing that there is a medical malpractice crisis), *with* Mitchell J. Nathanson, *It's the Economy (and Combined Ratio), Stupid: Examining the Medical Malpractice Litigation Crisis Myth and the Factors Critical to Reform*, 108 PENN ST. L. REV. 1077, 1078 (2004) ("[T]here has never been a medical malpractice litigation crisis, per se. Rather, if anything, there have been cyclical insurance crises throughout the years, crises that have to do more with fluctuations in the bond market than anything associated with medical malpractice litigation.").

grounds. Next, traditional notions of access to justice and the goals of the tort system are explored. Lastly, this Part examines the medical malpractice pleading laws in other states and compares them to those of Connecticut. This Note concludes that the most prudent approach to interpreting section 52-190a is to allow amendment of procedurally defective complaints—dismissal should not be mandated.

I. SECTION 52-190a: PAST AND CURRENT INTERPRETATIONS, LEGISLATIVE HISTORY, AND A COMPARISON TO THE APPROACHES OF OTHER STATES

A. *Prior Interpretation of Section 52-190a*

Though section 52-190a has been amended multiple times, its purpose has remained consistent—to prevent the filing of frivolous medical malpractice claims.[27] When section 52-190a was first enacted, the consequences of failing to include the required certificate were unclear.[28] The statute specified no remedy. Thus, until the Connecticut Supreme Court ruled on the matter in 1990, it was unclear "whether the failure to file a 'good faith' certificate as part of a medical malpractice suit [was] a jurisdictional defect."[29]

In 1990, the Connecticut Supreme Court decided *LeConche v. Elligers*.[30] The issue confronting the court was whether the legislature intended to make the good faith certificate an additional jurisdictional requirement.[31] The court noted that, based on the purpose of the statute, failure to include the certificate did not destroy the jurisdiction that otherwise existed.[32] The court remarked that "[t]he purpose [of the statute] is just as well served by viewing the statutory requirement that the complaint contain a good faith certificate as a pleading necessity akin to an essential allegation to support a cause of action."[33] Any deficiencies can be addressed

27. *See Mastrone*, 41 Conn. L. Rptr. 375; *see also Bruttomesso*, 698 A.2d at 802.

28. *See* Albert Zakarian & Barry D. Guliano, *Survey of Connecticut Tort Law: 1990*, 65 CONN. B.J. 171, 173 (1991).

29. *Id.*

30. LeConche v. Elligers, 579 A.2d 1 (Conn. 1990).

31. *Id.* at 6. The court noted that "'[s]ubject matter jurisdiction is the power of the court to hear and determine cases of the general class to which the proceedings in question belong.'" *Id.* at 5-6 (quoting Shea v. First Fed. Sav. & Loan Ass'n, 439 A.2d 997, 999 (Conn. 1981)).

32. *Id.* at 6.

33. *Id.*; *see also* 1 WESLEY W. HORTON & KIMBERLY A. KNOX, CONN. PRACTICE SERIES: SUPER. CT. CIV. RULES § 10-39, at 507-08 (2008 ed.) (stating that before the amendment of section 52-190a, the appropriate method for attacking a failure to supply

through amendment.[34] As a result, the court held that "in enacting [section] 52-190a, the legislature did not intend to make the good faith certificate a jurisdictional requirement."[35]

Before 2005, the thrust of the issue surrounding the interpretation of section 52-190a was whether the legislature showed a strong intent to make the good faith certificate a jurisdictional prerequisite.[36] Although *LeConche* had answered this question in the negative, the statute was amended in 2005 to add an enforcement provision.[37] The question then became whether this addition reflected a legislative intent to implicate the trial courts' subject matter jurisdiction.

B. *Legislative History of the 2005 Amendment*

The 2005 amendments to section 52-190a began as Senate Bill (S.B.) 1052.[38] Senator Louis C. DeLuca of the 32d District and Representative Robert M. Ward of the 86th District were the initial sponsors. As introduced, the bill's enforcement mechanism read: "[f]ailure to obtain and file the written opinion required by subsection (a) of this section shall be grounds for *immediate dismissal* of the action to recover damages that alleges that injury or death resulted from the negligence of a healthcare provider."[39] After review, the Judiciary Committee revised this provision to say: "[t]he failure to obtain and file the written opinion required by subsection (a) of this section shall be grounds for the dismissal of the action."[40] Thus, the Judiciary Committee removed the word "immediate" from the statute's enforcement clause. And, it is this language that was ultimately enacted.[41]

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a good faith certificate was a motion to strike). Thus, a complaint lacking a certificate was not subject to a motion to dismiss.

34. *LeConche*, 579 A.2d at 6.

35. *Id.* at 5.

36. *See id.*

37. *See* CONN. GEN. STAT. § 52-190a(c) (2007).

38. S. 1052, 2005 Gen. Assem., Reg. Sess. (Conn. 2005), *available at* http://www.cga.ct.gov/2005/TOB/s/pdf/2005SB-01052-R00-SB.pdf.

39. S. 1052, 2005 Gen. Assem., Reg. Sess. (Conn. 2005), *available at* http://www.cga.ct.gov/2005/tob/s/2005SB-01052-R00-SB.htm (emphasis added).

40. Sub. S. 1052, 2005 Gen. Assem., Reg. Sess. (Conn. 2005), *available at* http://www.cga.ct.gov/2005/tob/s/2005SB-01052-R01-SB.htm.

41. *See* CONN. GEN. STAT. § 52-190a(c). These amendments were met with lukewarm support. Some applauded strengthening the requirement of a good faith certificate. See, e.g., JUDICIARY COMM., STATE OF CONN. GEN. ASSEMBLY, REPORT ON BILLS FAVORABLY REPORTED BY COMMITTEE, S. Substitute Bill 1052, 2005 Gen. Assem., Reg. Sess. (Conn. 2005) (statement of Patrick J. Monahan, Vice President & Gen. Counsel, Connecticut Hospital Association), *available at* http://www.cga.ct.gov/2005/jfr/

Overall, the purpose of the statute remained the same—preventing the filing of baseless claims. Representative Lawlor noted that the amendment "makes it much more difficult to bring a medical malpractice action in court. Under this requirement, another medical provider would have to state, in explicit detail, his or her opinion that this is a meritorious claim."[42] Further, Senator McDonald remarked that "[t]he failure to attach such an opinion would require the court to dismiss the case."[43]

The amendments to section 52-190a were part of a comprehensive overhaul of Connecticut's medical malpractice system.[44] Part of the reform was designed to ensure that insurance companies would still write malpractice policies in Connecticut as many providers stated "that they were not interested in writing medical malpractice insurance in Connecticut unless there was significant tort reform."[45] Yet, the main catalyst for this bill was a desire to combat the steady rise in malpractice insurance rates for Connecticut physicians.[46]

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s/2005SB-01052-R00JUD-JFR.htm (last visited Apr. 15, 2009) (stating that the Connecticut Hospital Association supported strengthening the good faith certificate requirement). Others argued that retaining the good faith certificate was not a sufficiently strong reform. See, e.g., *id.* (statement of Dr. Jonathan G. Greenwald) (stating his opposition to the good faith certificate as "they are ineffective"; instead, he sought adoption of pre-trial screening panels). Those who claimed that S.B. 1052 did not go far enough argued instead that Connecticut should require prelitigation of all medical malpractice claims by a prelitigation panel, composed of two attorneys and two physicians. See id.

42. *House Session Transcript June 8, 2005*, 2005 Gen. Assem. 14 (Conn. 2005) (statement of Rep. Mike Lawlor). Further, prior to amendment of the statute, the required good faith certificate did not need to be attached to the complaint. OFFICE OF LEGISLATIVE RESEARCH, CONN. GEN. ASSEMBLY, OLR BILL ANALYSIS, S. Substitute B. 1052, 2005 Gen. Assem., Reg. Sess. (Conn. 2005), *available at* http://www.cga.ct.gov/2005/BA/2005SB-01052-R01-BA.htm (last visited Apr. 15, 2009). In fact, the plaintiff did not need the opinion of a similar medical professional to show the required good faith. *Id.* The amendment changed this, requiring that all complaints sounding in medical negligence include a written opinion from another doctor. *Id.*

43. *See* Rios v. CCMC Corp., 943 A.2d 544, 550 n.9 (Conn. App. Ct. 2008); 48 S. Proc., Pt. 14, 2005 Sess. (Conn. 2005) (statement of Sen. McDonald).

44. *House Session Transcript June 8, 2005*, *supra* note 42 (statement of Rep. Mike Lawlor) (noting that there are many different provisions in this legislation).

45. S. JUDICIARY COMMITTEE, REPORT ON BILLS FAVORABLY REPORTED BY COMMITTEE, Bill No.: S.B. 1052 at 1 (Conn. 2005).

46. *House Session Transcript June 8, 2005*, *supra* note 42 (statement of Rep. Mike Lawlor).

C. *The Current Version of Section 52-190a and Its Interpretation*

The 2005 amendment enlarged the scope of subsection 52-190a(a) and added subsection (c).[47] Subsection 52-190a(c) addresses the consequences of failing to attach the required certificate, stating: "The failure to obtain and file the written opinion required by subsection (a) of this section shall be grounds for the dismissal of the action."[48] Connecticut trial courts have struggled with interpreting this section,[49] and the appellate court has rendered only one decision interpreting it.[50]

1. The Rationale for Holding Dismissal Is Discretionary

In interpreting the statute, some courts have held that the decision to dismiss the complaint for failure to include the required certificate is discretionary.[51] For example, the court in *Donovan v. Sowell* noted that although the legislature seemed to be trying to make the certificate and written opinion a requirement for bringing an action for medical malpractice, it was not clear that the legislature was trying to make the certificate and written opinion a prerequisite for the court's subject matter jurisdiction.[52] Though the statute specifies dismissal as a remedy for a defective complaint,

> [i]t does not state . . . that a plaintiff's failure to comply with these requirements deprives the court of subject matter jurisdiction, or . . . that dismissal is mandatory. In other words, the lan-

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47. An Act Concerning Medical Malpractice, Sub. S. 1052, Pub. Act No. 05-275, § 2, Gen. Assem., Reg. Sess. (Conn. 2005).

48. CONN. GEN. STAT. § 52-190a(c) (2007).

49. *See, e.g.*, Landi v. Wertheim, No. CV065001608S, 2006 WL 2949103, at *2 (Conn. Super. Ct. Oct. 2, 2006) (noting the split in authority as to whether failure to include the required certificate implicates the court's subject matter jurisdiction).

50. *See* Rios v. CCMC Corp., 943 A.2d 544, 550-51 (Conn. App. Ct. 2008) (holding that "[t]he plain language of [subsection (c)] . . . expressly provides for dismissal" of deficient complaints). Though the court does not expressly state that a deficient complaint *must* be dismissed, it is implied through its quotation of Senator Andrew McDonald. *See id.* at 550 n.9.

51. *See* Cunningham v. Talmadge Park, Inc., 43 Conn. L. Rptr. 400, 401-02 (Conn. Super. Ct. 2007); Greer v. Norbert, 42 Conn. L. Rptr. 806 (Conn. Super. Ct. 2007); Donovan v. Sowell, 41 Conn. L. Rptr. 609, 610-13 (Conn. Super. Ct. 2006).

52. *Donovan*, 41 Conn. L. Rptr. at 611. The court stated:

> The language that the legislature used in subsection (a) suggests that the legislature intended the filing of the written opinion to serve as a sort of "jurisdictional" hurdle that a plaintiff must pass in order to maintain a medical malpractice action. The type of jurisdiction that the legislature had in mind, however, is not obvious from a preliminary reading of the text of the statute.

Id.

> guage . . . is not the type of mandatory language that can only be read as implicating the court's subject matter jurisdiction.[53]

The court noted that Connecticut has "a presumption in favor of subject matter jurisdiction," and as a result, "a strong showing of legislative intent" is required to rebut that presumption.[54] Further, "[e]ven when mandatory language is used in such statutes . . . 'such language alone does not overcome the strong presumption of jurisdiction, nor does such language alone prove strong legislative intent to create a jurisdictional bar.'"[55] In light of these principles, the court stated that the plain language of section 52-190a(c) does not provide the required "strong showing of legislative intent"[56] that "would implicate the court's subject matter jurisdiction."[57]

Continuing, the court observed that there was no other evidence that the legislature intended such a result:

> The source of a court's [subject matter] jurisdiction is the constitutional and statutory provisions by which it is created . . . . The Superior Court of this state "shall be the sole court of original jurisdiction [except such actions over which the courts of probate have original jurisdiction, as provided by statute]."[58]

Further, the court pointed out that Connecticut trial courts traditionally have jurisdiction over medical malpractice claims.[59] In the same vein, the court in *Cunningham v. Talmadge Park, Inc.* noted that "the ability to sue for professional negligence is a common-law right given to citizens to redress their grievances in the only practical forum available—i.e. the courts. Before that right is circumscribed it must be absolutely clear that the legislature intended to curtail its exercise."[60]

The court in *Donovan* then addressed the use of the word "shall" in section 52-190a(c).[61] Although the word "shall" appears

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53. *Id.*

54. *Id.* (quoting Williams v. Comm'n on Human Rights & Opportunities, 777 A.2d 645, 651 (Conn. 2001)).

55. *Id.* (quoting *Williams*, 777 A.2d at 653).

56. *Id.* (quoting *Williams*, 777 A.2d at 651).

57. *Id.*

58. *Id.* (alterations and omissions in original) (quoting Demar v. Open Space & Conservation Comm'n, 559 A.2d 1103, 1107-08 (Conn. 1989)).

59. *Id.* (quoting LeConche v. Elligers, 579 A.2d 1, 6 (Conn. 1990)).

60. Cunningham v. Talmadge Park, Inc., 43 Conn. L. Rptr. 400, 401-02 (Conn. Super. Ct. 2007). Similar arguments have been used to strike down medical malpractice pleading statutes in other states. *See, e.g.*, Zeier v. Zimmer, Inc., 152 P.3d 861, 866-67 (Okla. 2006).

61. *Donovan*, 41 Conn. L. Rptr. at 612.

in the statute's enforcement clause and "has often been held to be mandatory . . . its use in this section does not mandate that such a certificate is jurisdictional."[62] Instead, the Connecticut Supreme Court has articulated a test for determining whether "shall" is mandatory or discretionary.[63] The court must examine whether the action to be taken (in this case dismissal) "is of the essence of the thing to be accomplished."[64] The court reasoned that since the overarching goal of section 52-190a is to prevent the filing of frivolous lawsuits,[65] the required certificate is not "so central to that purpose that it is of the essence of the thing to be accomplished."[66] Instead, the court stated that the purpose of the statute is better served by treating the good faith certificate as a "pleading necessity akin to an essential allegation to support a cause of action."[67] Thus, the court held that failing to include the required certificate is a curable deficiency.[68]

The court then observed that this holding was consistent with the statutory consequences for filing a false certificate, which had not changed since *LeConche*.[69] The statute provides that as a consequence of filing a false certificate, the court shall impose an appropriate sanction.[70] The court reasoned that since dismissal would be a possible consequence for filing a false certificate, "it is clear that such a dismissal would be discretionary, rather than required due to lack of subject matter jurisdiction."[71] The court further reasoned that it would be bizarre to mandate dismissal when a party "merely fail[s]" to file the required certificate, but leave dismissal discretionary when a party files a false certificate.[72]

Other courts have held, based on the plain meaning of the statute, that a failure to obtain and file the required certificate is not a jurisdictional defect.[73] For example, the court in *Greer v. Norbert*

62. *Id.* (quoting *LeConche*, 579 A.2d at 6).

63. *Id.*

64. *Id.* (quoting *LeConche*, 579 A.2d at 6).

65. *See* Bruttomesso v. Ne. Conn. Sexual Assault Crisis Servs., Inc., 698 A.2d 795, 802 (Conn. 1997).

66. *Donovan*, 41 Conn. L. Rptr. at 612 (quoting *LeConche*, 579 A.2d at 6).

67. *Id.*

68. *Id.* (citing *LeConche*, 579 A.2d at 6).

69. *Id.*

70. *Id.*

71. *Id.* at 612-13 (quoting *LeConche*, 579 A.2d at 6).

72. *Id.* at 613 (quoting *LeConche*, 579 A.2d at 6).

73. *See, e.g.*, Greer v. Norbert, 42 Conn. L. Rptr. 806, 808 (Conn. Super. Ct. 2007).

examined the word "grounds" as it was used in subsection (c).[74] The court looked at multiple definitions, and held that they all led to the conclusion that the court has discretion to determine whether a complaint should be dismissed for failure to file the required certificate.[75] In light of the definitions, and the fact "that the statute does not say 'the action *shall* be dismissed,'" the court found that it had discretion to determine whether to dismiss the complaint.[76]

2. The Rationale for Holding That Dismissal Is Mandatory

Other courts have found that the plain meaning of the statute compels dismissal when the plaintiff fails to file the required certificate and opinion.[77] The Connecticut Superior Court stated that "[a]n application of the commonly approved usage of the English language to this statute surely compels the conclusion that the above provision requires dismissal of the case if plaintiff did not obtain and file any opinion at all."[78] The court noted that "[a]ny other action would render the language of the statute superfluous" and thus in contradiction with one of the canons of statutory construction.[79] In a separate opinion, the court recognized that the result, then, is that "[o]nly those cases commenced by a complaint with the written opinion of a medical provider attached to the complaint . . . may be heard and, thus, failure to attach the required opinion implicates the court's subject matter jurisdiction."[80]

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74. *Id.* at 807.

75. *Id.* at 808. The court turned to legal dictionaries, noting that *Black's Law Dictionary* defines "ground" as "[t]o provide a basis for something (such as e.g., a legal claim or argument)," *id.* (internal quotation marks omitted) (quoting BLACK'S LAW DICTIONARY 723 (8th ed. 2004) [hereinafter BLACK'S]), and that *Ballentine's Law Dictionary* defines "ground" as "[a] point; a reason; support for a cause or action. The basis for taking a step in an action," *id.* (internal quotation marks omitted) (quoting BALLENTINE'S LAW DICTIONARY 538 (3d ed. 1969)).

76. *Id.* at 807-08.

77. *See* Peloso v. Walgreen E. Co., Inc., 42 Conn. L. Rptr. 838, 840 (Conn. Super. Ct. 2007); Landry v. Zborowski, 44 Conn. L. Rptr. 56, 58 (Conn. Super. Ct. 2007), *vacated in part by* Landry v. Zborowski, No. TTDCV076000211S, 2007 WL 4105519 (Conn. Super. Ct. Oct. 26, 2007) (vacating on reargument part of the original decision to dismiss the entire complaint on the grounds that one count of the complaint sounded in informed consent, not medical malpractice, and thus that count should not have been dismissed); Kirkpatrick v. New Britain Gen. Hosp., 42 Conn. L. Rptr. 519, 520 (Conn. Super. Ct. 2006); Mastrone v. St. Vincent's Med. Ctr., 41 Conn. L. Rptr. 375, 376 (Conn. Super. Ct. 2006); Kudera v. Ridgefield Physical Therapy, LLC, No. DBDCV065000993S, 2006 WL 2773651, at *1 (Conn. Super. Ct. Sept. 18, 2006); Andrikis v. Phoenix Internal Med., 41 Conn. L. Rptr. 222, 225 (Conn. Super. Ct. 2006).

78. *Landry*, 44 Conn. L. Rptr. at 57.

79. *Id.* at 58.

80. *Mastrone*, 41 Conn. L. Rptr. at 376.

Further, some courts have held that the legislative history supports the idea that the certificate and written opinion form a prerequisite for the court's subject matter jurisdiction.[81] The court in *Andrikis v. Phoenix Internal Medicine*[82] reviewed the legislative history in depth and found the following statement by Senator Kissel:

> [R]equiring a plaintiff to obtain and file a detailed opinion supporting good faith would 'help the defense counsel and their clients right into the ballpark, right at the inception of the medical malpractice case . . . [because it would allow] . . . counsel and their clients [to] really narrow down exactly what was the basis for the determination of the basis for the plaintiff's claim that there was medical malpractice and why they had brought that case.[83]

Other legislators noted during these hearings that the purpose of the legislation was to make bringing a malpractice claim more difficult.[84] As a result of these statements, the court concluded that the "legislative intent indicate[s] that the requirement of obtaining and filing an opinion was intended as a jurisdictional hurdle for medical malpractice actions."[85]

After reviewing the legislative history, the court in *Peloso v. Walgreen Eastern Co.* concluded that the failure to include the required certificate and opinion mandates dismissal.[86] Great weight was placed on a remark by Senator McDonald that the "failure to attach such an opinion would *require* the court to dismiss the case."[87] Given the legislature's stated goal of ensuring quick resolution of medical malpractice claims,[88] the court reasoned that "[a]llowing the court jurisdiction to order the plaintiff to amend his complaint in the face of a pending motion to dismiss would contravene this goal of speedier process."[89] As a result, the court con-

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81. *See, e.g.*, *Peloso*, 42 Conn. L. Rptr. at 841 n.9; *Andrikis*, 41 Conn. L. Rptr. at 225.

82. *Andrikis*, 41 Conn. L. Rptr. 222.

83. *Id.* at 225 (quoting *Senate Session Transcript June 6, 2005*, 2005 Gen. Assem. (Conn. 2005) (statement of Sen. Richard Kissel, Ranking Member of the Committee on Aging)).

84. *See id.* (citing *House Session Transcript June 8, 2005*, *supra* note 42).

85. *Id.*

86. *Peloso*, 42 Conn. L. Rptr. at 841 n.9.

87. *Id.*

88. *Id.*

89. *Id.*

cluded that it lacked the power to order amendment—it did not have the discretion to order any remedy besides dismissal.[90]

This approach was essentially endorsed by the Appellate Court of Connecticut in *Rios v. CCMC Corp.*[91] Though the court did not analyze the reasoning of the trial courts that have interpreted section 52-190a(c), it held that the 2005 amendment overruled *LeConche*.[92] In conclusion, the court held that "[t]he plain language of this new statutory subsection, which was not in effect at the time of *LeConche* . . . , expressly provides for dismissal of an action when a plaintiff fails" to comply with the statute.[93]

D. *The Approaches of Other States to Medical Malpractice Actions*

Connecticut is one of many states that has identified medical malpractice suits as a special class of actions.[94] Many states require heightened pleading similar to that present in Connecticut.[95] Illinois even used identical language.[96] However, some of these states have set up a different statutory framework.[97] For example, Minne-

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90. *Id.*; *see also* Kudera v. Ridgefield Physical Therapy, LLC, No. DBDCV065000993S, 2006 WL 2773651, at *1 (Conn. Super. Ct. Sept. 18, 2006).

91. Rios v. CCMC Corp., 943 A.2d 544 (Conn. App. Ct. 2008).

92. *Id.* at 550.

93. *Id.*

94. *See, e.g.*, ALASKA STAT. § 09.55.536 (2006); DEL. CODE ANN. tit. 18, § 6853 (Supp. 2006); GA. CODE. ANN. § 9-11-9.1 (Supp. 2008); HAW. REV. STAT. ANN. § 671-12.5 (LexisNexis 2007); MICH. COMP. LAWS ANN. § 600.2912d (West 2000); MINN. STAT. ANN. § 145.682 (West 2005); MISS. CODE ANN. § 11-1-58 (Supp. 2007); MO. ANN. STAT. § 538.225 (West 2008); MONT. CODE ANN. § 27-6-105 (2007); NEV. REV. STAT. ANN. § 41A.071 (LexisNexis 2006); N.Y.C.P.L.R. 3012-a (McKinney 1991); VA. CODE ANN. § 8.01-20.1 (2007); WYO. STAT. ANN. § 9-2-1806 (2007); OKLA. STAT. ANN. tit. 63 § 1-1708.1E (West 2004), *invalidated by* Zeier v. Zimmer, 152 P.3d 861 (Okla. 2006).

95. *See, e.g.*, DEL. CODE ANN. tit. 18 § 6853; GA. CODE. ANN. § 9-11-9.1; HAW. REV. STAT. § 671-12.5; MICH. COMP. LAWS § 600.2912d; MINN. STAT. § 145.682; MISS. CODE ANN. § 11-1-58; MO. ANN. STAT. § 538.225; NEV. REV. STAT. § 41A.071; N.Y.C.P.L.R. 3012-a; VA. CODE ANN. § 8.01-20.1; OKLA. STAT. tit. 63 § 1-1708.1E. Some states also require presentation of the claim to a medical malpractice review board or other similar body. *See, e.g.*, ALASKA STAT. § 09.55.536; DEL. CODE ANN. tit. 18 § 6803; HAW. REV. STAT. § 671.12; MONT. CODE ANN. § 27-6-105; WYO. STAT. ANN. § 9-2-1806. In lieu of requiring a plaintiff to find a physician willing to write a letter stating that there is evidence of medical negligence, these review bodies examine the evidence and determine whether the claim should proceed.

96. 735 ILL. COMP. STAT. 5/2-622 (West 2003), *invalidated by* Best v. Taylor Mach. Works, 689 N.E.2d 1057 (Ill. 1997) (holding that this statute was unconstitutional only because the statute would be meaningless without other statutes that were explicitly struck down).

97. *See, e.g.*, MINN. STAT. § 145.682.

sota, unlike Connecticut, has a demand requirement.[98] Under this statute, the plaintiff has sixty days to produce the required affidavit after the defendant demands it.[99]

Many states have had issues with their certificate of merit statutes because defendants had begun to use them as a sword, rather than a shield, in an attempt to avoid liability.[100] For instance, in New Jersey, as a result of the dismissal of many seemingly meritorious claims,[101] judges have felt compelled to invoke the substantial compliance doctrine in order to prevent injustice.[102] It would behoove Connecticut courts to be aware of these problems while construing Connecticut's certificate of merit statute.

II. CONNECTICUT COURTS ARE NOT REQUIRED TO DISMISS ALL PROCEDURALLY DEFICIENT COMPLAINTS UNDER SECTION 52-190a

In this Part, section 52-190a is interpreted in accordance with the rules of statutory construction. Section A examines the plain language of the statute, noting the rule in Connecticut that a strong showing of intent is required to create a barrier to the court's subject matter jurisdiction. This Section concludes that not only is such intent lacking on the face of the statute, but instead the statutory language affirmatively reflects an intent to give the court discretion in determining whether dismissal is warranted. This Section also analyzes the cases that conclude that the statute creates a jurisdictional bar, and points out their flaws. Section B further explores the intent of the legislature in amending section 52-190a. First, early drafts of the 2005 amendments to the statute are explored. Next, subsection (c) of the statute is examined in light of the rest of the statute. Further, this Section explores the viability of prior case law, principally *LeConche v. Elligers*. Lastly, this Section explores the goals of section 52-190a and concludes that the legislature has

98. *Id.* § 145.682(6)(a).

99. *Id.*

100. *See* Abbott S. Brown, *The Affidavit of Merit Mess*, 163 NEW JERSEY L.J. 427, 427 (2001); *see also* Melinda L. Stroub, Note, *The Unforeseen Creation of a Procedural Minefield—New Jersey's Affidavit of Merit Statute Spurs Litigation and Expense in its Interpretation and Application*, 34 RUTGERS L.J. 279, 279 (2002) (noting that this "statute has been a minefield for plaintiffs' attorneys with disastrous results—with one misstep, plaintiffs' cases have been quickly disposed of and been barred from re-filing").

101. Brown, *supra* note 100, at 427; Stroub, *supra* note 100, at 288.

102. Medeiros v. O'Donnell & Naccarato, Inc., 790 A.2d 969, 973-74 (N.J. Super. Ct. App. Div. 2002).

not manifested an intent to create a hurdle for the court's subject matter jurisdiction.

A. *Plain Meaning of the Statute*

1. Section 52-190a Does Not Clearly Implicate the Subject Matter Jurisdiction of Connecticut Trial Courts

Connecticut requires a clear showing of legislative intent before a statute is read as creating a hurdle for the court's subject matter jurisdiction.[103] Though a statute may use mandatory language (language that compels a certain result),[104] that language alone may not always provide the required showing of intent.[105] Speaking in the context of a statute of limitations, the Connecticut Supreme Court noted that, "[a]lthough we acknowledge that mandatory language may be an indication that the legislature intended a time requirement to be jurisdictional, such language alone does not overcome the strong presumption of jurisdiction, nor does such language alone prove strong legislative intent to create a jurisdictional bar."[106]

Facially, this statute provides little indication that dismissal is required for failure to include the required certificate and opinion. Section 52-190a(c) states that "[t]he failure to obtain and file the written opinion required by subsection (a) of this section shall be grounds for the dismissal of the action."[107] The word "shall" can be either directory or mandatory, depending upon the manner in which it is used.[108] Use of the word "shall" in a statute is mandatory when "the prescribed mode of action [(here dismissal)]

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103. Donovan v. Sowell, 41 Conn. L. Rptr. 609, 611 (Conn. Super. Ct. 2006) (quoting Williams v. Comm'n on Human Rights & Opportunities, 777 A.2d 645, 651 (Conn. 2001)).

104. *See* Maitan v. Access Ambulance Co., 44 Conn. L. Rptr. 436, 437 (Conn. Super. Ct. 2007). An example of mandatory language would be "the action shall be dismissed." *Id.* This court concluded that the language in the statute, "shall be grounds for dismissal," was not mandatory and thus allowed for discretionary dismissal. *Id.*

105. *Donovan*, 41 Conn. L. Rptr. at 611 (quoting *Williams*, 777 A.2d at 651).

106. *Williams*, 777 A.2d at 653. The Court further explained the distinction between mandatory language and subject matter jurisdiction—if language is mandatory, it may be satisfied through waiver or consent, two doctrines anathema to the rules regarding subject matter jurisdiction. *Id.*

107. CONN. GEN. STAT. § 52-190a(c) (2007).

108. LeConche v. Elligers, 579 A.2d 1, 6 (Conn. 1990); *see also* BLACK'S, *supra* note 75, at 493 (A "directory requirement" is "[a] statutory or contractual instruction to act in a way that is advisable, but not absolutely essential—in contrast to a mandatory requirement. A directory requirement is frequently introduced by the word should or, less frequently, shall (which is more typically a mandatory word).").

is of the essence of the thing to be accomplished."[109] Language is directory if "failure to comply with the requirement does not compromise the purpose of the statute."[110] The Supreme Court of Connecticut applied this test in *LeConche v. Elligers*, holding that it was not satisfied.[111] The Court began by noting that the purpose of the statute is to prevent the filing of frivolous lawsuits.[112] However, the Court was unable to conclude that dismissing a claim lacking the required documentation was so vital to the goal of preventing the filing of frivolous lawsuits that it was "of the essence."[113]

Even with the 2005 amendments, the purpose of section 52-190a has remained unchanged.[114] Thus, although the legislature has added an enforcement provision to section 52-190a,[115] the statute still must be examined in light of these authorities. The goal of the statute can still be achieved even if procedurally deficient claims are not dismissed—a trial judge can grant leave to amend. If a claim is baseless, an attorney should be unable to get the required certificate, resulting in the inevitable termination of the litigation.[116] However, a meritorious claim would still be allowed to proceed as long as leave to amend the complaint was allowed.[117]

Moreover, the legislature's use of the term "grounds" in the statute supports the assertion that dismissal is directory, not mandatory. The word has been assigned definitions such as "[t]o provide a basis for (something, e.g., a legal claim or argument)"[118] or "[a] point; a reason; support for a cause or action. The basis for

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109. *LeConche*, 579 A.2d at 6 (internal quotation marks omitted) (quoting Vartuli v. Sotire, 472 A.2d 336, 341 (Conn. 1984)).

110. Angelsea Prods., Inc. v. Comm'n on Human Rights & Opportunities, 674 A.2d 1300, 1306 (Conn. 1996).

111. *LeConche*, 579 A.2d at 6.

112. *Id.*

113. *Id.*

114. *See* Mastrone v. St. Vincent's Med. Ctr., 41 Conn. L. Rptr. 375 (Conn. Super. Ct. 2006) (The purpose of the legislation "is to inhibit a plaintiff from bringing an inadequately investigated cause of action, whether in tort or in contract, claiming negligence by a health care provider." (quoting Bruttomesso v. Ne. Conn. Sexual Assault Crisis Servs., Inc., 698 A.2d 795, 802 (Conn. 1997))).

115. CONN. GEN. STAT. § 52-190a(c) (2005).

116. If an attorney was able to certify a frivolous claim, that would signify a more fundamental flaw with the statute's relationship to its goal.

117. *See* Santorso v. Bristol Hosp., 42 Conn. L. Rptr. 724, 726 (Conn. Super. Ct. 2007) (holding that failure to include the required certificate is a curable deficiency); *see also* Greer v. Norbert, 42 Conn. L. Rptr. 806, 808 (Conn. Super. Ct. 2007); Donovan v. Sowell, 41 Conn. L. Rptr. 609, 613 (Conn. Super. Ct. 2006).

118. BLACK'S, *supra* note 75, at 723.

taking a step in an action."[119] This language does not strongly suggest that the claim must be dismissed. Instead, it indicates that a court has a basis for dismissal when a litigant fails to include the required certificate.

Further, even if the arguments above do not conclusively demonstrate that dismissal is discretionary, they at least demonstrate that the statute is ambiguous. Given the presumption in favor of a court having subject matter jurisdiction, a strong showing of intent is required to deprive a court of such jurisdiction.[120] Due to its ambiguity, the language in section 52-190a does not provide a clear showing of the required intent.

In light of these definitions, interpretations, and principles, a working construction of subsection (c) of the statute emerges. A court, if it is so inclined, can find a basis for dismissal of a complaint for failure to include the good faith certificate required under subsection (a). Under this plain meaning construction, the language of the statute shows that dismissal is not required. Though the court may consider dismissing the claim, it is not required to do so.

2. Addressing Cases That Require Dismissal Under Section 52-190a

a. Rebutting the presumption in favor of a court's subject matter jurisdiction

In *Mastrone v. St. Vincent's Medical Center*, the court makes a strong argument that dismissal is required for all procedurally defective complaints.[121] The court begins by stating that all "complaints . . . shall have a written opinion of a medical provider attached or *be subject to dismissal*."[122] Noting that the amendments to section 52-190a "specifically limit" the power of a court to hear medical malpractice cases, the court held that it is barred from hearing those cases that are not commenced with the required written opinion.[123] As a result, "failure to attach the required opinion implicates the court's subject matter jurisdiction."[124]

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119. BALLENTINE'S, *supra* note 75, at 538.

120. *Donovan*, 41 Conn. L. Rptr. at 611 (quoting Williams v. Comm'n on Human Rights & Opportunities, 777 A.2d 645, 651 (Conn. 2001)).

121. Mastrone v. St. Vincent's Med. Ctr., 41 Conn. L. Rptr. 375 (Conn. Super. Ct. 2006).

122. *Id.* at 376 (emphasis in original).

123. *Id.*

124. *Id.*

This textual argument is very strong. The court recognizes the mandatory language in subsection (c) that all complaints must contain the required certificate and written opinion. Since these must be attached to the complaint, certainly a colorable argument can be made that the court lacks power to hear cases where they are not attached. However, this argument is not persuasive.

A strong showing of intent is required to demonstrate the creation of a hurdle for the court's subject matter jurisdiction.[125] Although the court correctly observed that the statute clearly requires all complaints to contain the documentation required by subsection (a), it is not so clear that dismissal is mandated for those complaints. Since the goals of the statute could still be served if these complaints are amended, dismissal is not essential to those goals.

The reasoning of other courts has been more problematic. In *Peloso v. Walgreen Eastern Co., Inc.*, the court stated that since "'[d]ismissal' refers to the action taken when a court lacks jurisdiction,"[126] the required opinion and certificate were "an absolute prerequisite for the court's subject matter jurisdiction, and . . . the court does not have discretion in its exercise."[127] This approach is faulty for two reasons.

First, it overlooks the fact that the term "shall be grounds" is used in the statute. Though a statute that stated, "failure to include the required certificate must result in dismissal of the claim"[128] would clearly create a jurisdictional hurdle, this statute is far less clear. The court needed to analyze the term "shall be grounds" to arrive at this conclusion. It did not do so.[129]

Second, use of the term "dismissal" in a statute does not, in and of itself, create a jurisdictional barrier. In reaching the conclusion that the court must dismiss all deficient complaints, the court in *Peloso* stated that, as a matter of interpretation, if a statutory term is a legal term of art, it should be construed in accordance with its legal definition.[130] As a result, the court concluded that since dismissal occurs when a court does not have jurisdiction, "[t]he weight

125. *See supra* notes 103-106 and accompanying text.

126. Peloso v. Walgreen E. Co., Inc., 42 Conn. L. Rptr. 838, 841 n.9 (Conn. Super. Ct. 2007).

127. *Id.*

128. *See* Santorso v. Bristol Hosp., 42 Conn. L. Rptr. 724, 726 (Conn. Super. Ct. 2007) (strongly implying that if the statute stated that dismissal was mandatory for a deficient complaint, it would be more likely that the statute implicated the court's subject matter jurisdiction).

129. *Peloso*, 42 Conn. L. Rptr. at 841 n.9.

130. *Id.* (citing CONN. GEN. STAT. § 1-1 (2007)).

of authority . . . holds that the submission of an opinion of a similar health care provider is an absolute prerequisite for the court's subject matter jurisdiction, and . . . the court does not have discretion in its exercise."[131]

This reasoning is flawed. If a statute stated, for example, that as a result of a pleading deficiency "the court may dismiss the claim," it would be difficult to argue that dismissal was mandatory. A judge clearly would have discretion; otherwise, the word "may" would be given the same definition as the word "must." This would be highly problematic as the two terms have separate and distinct meanings. Similarly, the mere fact that the legislature used the word "dismissal" in section 52-190a(c) does not create a jurisdictional threshold in and of itself.[132] The court needed to interpret the rest of the statute to arrive at that conclusion; yet, it did not.

Other cases finding that dismissal is mandatory have done so in a conclusory manner.[133] For example, in *Landry v. Zborowski*, the court stated that "[a]n application of the commonly approved usage of the English language to this statute surely compels the conclusion that [subsection (c)] requires dismissal of the case if plaintiff did not obtain and file any opinion at all."[134] The court did not engage in any meaningful statutory construction.[135] Similarly, in *Kirkpatrick v. New Britain General Hospital*, the court stated that since it was clear that the plaintiff did not obtain the required written opinion, the "plain and specific language of the statute" man-

131. *Id.*

132. *See* Williams v. Comm'n on Human Rights & Opportunities, 777 A.2d 645, 653 (Conn. 2001) (holding that use of mandatory language alone is insufficient to create a jurisdictional hurdle). If even the use of mandatory language does not overcome the strong presumption in favor of jurisdiction, surely the use of the word "dismissal" does not either. This is especially true in light of the somewhat ambiguous wording of the statute. Since the statute says "shall be grounds for dismissal" instead of "must be dismissed" the language should not be read as evidence of the required legislative intent. *See* CONN. GEN. STAT. § 52-190a(c) (2007).

133. *See* Landry v. Zborowski, 44 Conn. L. Rptr. 56 (Conn. Super. Ct. 2007), *vacated in part by* Landry v. Zborowski, No. CV076000211S, 2007 WL 4105519 (Conn. Super. Ct. Oct. 26, 2007); Kirkpatrick v. New Britain Gen. Hosp., 42 Conn. L. Rptr. 519 (Conn. Super. Ct. 2006).

134. *Landry*, 44 Conn. L. Rptr. at 57.

135. *Id.* The court did not analyze the statute aside from this naked conclusion. However, the court then engaged in statutory construction in the context of an insufficiently detailed opinion. *Id.* at 58. The court concluded that dismissal is mandatory for an insufficiently detailed opinion because subsection (c) calls for the written opinion "required by subsection (a)." *Id.* Since subsection (a) requires a detailed opinion, failure to include a sufficiently detailed opinion results in mandatory dismissal. *Id.*

dated dismissal.[136] However, the court did not break down the statute in reaching this conclusion.[137]

b. *Internal inconsistencies in cases reading section 52-190a as creating a barrier to subject matter jurisdiction*

Many of the courts that have concluded that attachment of the required documentation is a hurdle for the court's subject matter jurisdiction have not been internally consistent.[138] For example, in *Andrikis v. Phoenix Internal Medicine*, the court found that "[t]he statutory language, and the legislative intent indicate that the requirement of obtaining and filing an opinion was intended as a jurisdictional hurdle for medical malpractice actions."[139] However, the court held that an insufficient opinion is not grounds for dismissal of the action.[140]

While it seems like a prudent approach to wait until discovery has occurred before determining whether a written opinion is sufficient,[141] this approach is inconsistent with the view that a certificate and opinion are a threshold jurisdictional requirement.[142] Subsection (c) states that "[t]he failure to obtain and file *the written opinion required by subsection (a) of this section* shall be grounds for the dismissal of the action."[143] Subsection (a) requires "a written and

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136. *Kirkpatrick*, 42 Conn. L. Rptr. at 520. This naked assertion is all the court gave. *Id.* The court stated that because the plaintiff did not have the written opinion prior to filing his complaint, "this would trigger subsection (c) of the statute so that the court would be compelled to dismiss the complaint." *Id.* at 519. Although the plaintiff argued that there would be no prejudice to the defendant if amendment was allowed, the court, despite agreeing, held that it was bound by the plain and clear statutory language. *Id.* at 520.

137. *Id.*; *see also* Grammond v. Greenwich Hosp., No. FSTCV065000533, 2006 WL 2536596, *1 (Conn. Super. Ct. Aug. 16, 2006) (stating that "[t]he plain language of the statute requires that this court dismiss the action unless the plaintiff has submitted a written opinion of a health care provider" without engaging in statutory construction).

138. *See, e.g.*, Andrikis v. Phoenix Internal Med., 41 Conn. L. Rptr. 222 (Conn. Super. Ct. 2006). *But see Landry*, 44 Conn. L. Rptr. 56 (holding that dismissal is mandatory for an insufficiently detailed opinion because subsection (c) requires the opinion "required by subsection (a)"—a detailed opinion).

139. *Andrikis*, 41 Conn. L. Rptr. at 225.

140. *Id.*

141. This is the majority approach. *See* Vicenzi v. Abbott Terrace Health Ctr., Inc., 44 Conn. L. Rptr. 363, 364-65 (Conn. Super. Ct. 2007) (noting that a majority of the Connecticut trial courts that have decided this issue have held that the sufficiency of the written opinion included with the good faith certificate is not tested with a motion to dismiss).

142. *See Landry*, 44 Conn. L. Rptr. at 57.

143. CONN. GEN. STAT. § 52-190a(c) (2007) (emphasis added). For the text of subsection (a), see *supra* text accompanying note 16.

signed opinion of a similar health care provider . . . that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion."[144] Thus, subsection (a) does not just require a written opinion, it requires a detailed opinion. If subsection (c) forms a jurisdictional hurdle, it is not satisfied merely by inclusion of a written opinion—the opinion must be sufficiently detailed. Courts are understandably reluctant to dismiss cases at this stage. However, if subsection (c) forms a jurisdictional hurdle, then all claims containing opinions of insufficient detail must be dismissed because they fail to meet the requirements of subsection (a). If the opinion and written certificate required by subsection (a) are a prerequisite for the court's subject matter jurisdiction, then the court lacks the discretion to state that insufficiently detailed complaints should not be dismissed.

The court in *Cunningham v. Talmadge Park, Inc.* pointed out the absurdities that could result from allowing the sufficiency of the written opinion of a similar medical professional to be challenged via a motion to dismiss:

> [I]f trial judges were required to treat motions to dismiss in the § 52-190a context as raising subject matter jurisdiction[,] . . . *to what talisman do trial judges turn to decide whether in a particular case sufficient detail has been provided to show a basis for the malpractice action*? Do we hold evidentiary hearings to decide the question? Do we just hear oral argument? All of this does not have the ring of defining an issue that should be decided on the basis of subject matter jurisdiction. The legislature must be presumed to have intended sensible results from the application of its legislation.[145]

As a result, the court concluded that subsection (c) does not implicate the court's subject matter jurisdiction.[146] Instead, the court concluded that the legislative language was meant to set up a "procedural rule requiring plaintiffs to provide mandatory information or discovery at the inception of litigation without the need for the defendant to move for such information."[147] Consequently, the court found that the sanction of a non-suit provides a possible rem-

144. *Id.* § 52-190a(a).

145. Cunningham v. Talmadge Park, Inc., 43 Conn. L. Rptr. 400, 401 (Conn. Super. Ct. 2007) (emphasis added).

146. *Id.*

147. *Id.* at 402.

edy, as that is one of the sanctions provided for under Connecticut's discovery rules.[148]

This is the most logical approach. First, it allows a court to determine when a claim should be dismissed. Second, it avoids the inconsistency present in *Andrikis*[149] by providing that the standard for determining whether a case should be dismissed is the same regardless of whether the motion to dismiss is filed for failing to include the required opinion or for including an insufficiently detailed opinion.

B. *Legislative Intent*

When statutory language is unclear and ambiguous on its face, the court must determine the legislative intent and give it effect.[150] With section 52-190a, the Connecticut legislature did not intend to mandate dismissal of all deficient complaints. Instead, it intended failure to include the required documentation to constitute a curable defect.

1. Early Drafts of the Statute

As originally introduced, the enforcement clause of the bill stated that failure to file the written opinion "*shall be grounds for immediate dismissal.*"[151] The version that was ultimately enacted reads: "The failure to obtain and file the written opinion required by subsection (a) of this section shall be grounds for the dismissal of the action."[152] The question becomes whether "immediate" was removed for a reason.

The legislative history contains no explanation why the Judiciary Committee removed this word. This begs the question—was the word removed because it made an undesirable contribution to the statute? A court presented with a challenge to its subject matter jurisdiction must resolve the challenge before proceeding to any trial on the merits; thus, use of the term "immediate" in the original version of the statute suggests that a court must decide whether or

148. *Id.*

149. Andrikis v. Phoenix Internal Med., 41 Conn. L. Rptr. 222 (Conn. Super. Ct. 2006).

150. CONN. GEN. STAT. § 1-2z (2007). This rule of statutory construction is in line with the approach of most other states. *See* 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION 46:01 (7th ed. 2007).

151. S. 1052, 2005 Gen. Assem., Reg. Sess. (Conn. 2005) (emphasis added); *supra* Part I.B.

152. CONN. GEN. STAT. ANN. § 52-190a(c).

not to dismiss the complaint before moving on to the merits of the case.[153] In other words, it appears that the word created a prerequisite for the court's subject matter jurisdiction. As previously stated, the language as amended does not as clearly implicate the court's subject matter jurisdiction.[154] If the legislature wanted to create a hurdle for the court's subject matter jurisdiction, enacting the statute as introduced would have accomplished that goal. This is especially true in light of the strong presumption in favor of a court having subject matter jurisdiction, a rule about which the legislature is presumed to be aware.[155] Consequently, if it wanted to make a hurdle for the court's subject matter jurisdiction, it needed to do more.

This point is reinforced after consideration of an early draft of subsection (a) of the amendment. Regarding the consequences of filing a good faith certificate in bad faith, the early version of subsection (a) stated in part that:

> If the court determines, after the completion of discovery, that such certificate was not made in good faith and that no justiciable issue was presented against a health care provider that fully cooperated in providing informal discovery, the court upon motion or upon its own initiative shall impose upon the person who signed such certificate or a represented party, or both, an appropriate sanction which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee. The court may also submit the matter to the appropriate authority for disciplinary review of the attorney if the claimant's attorney submitted the certificate *or the action shall be subject to immediate dismissal pursuant to subsection [(d)] of this section.*[156]

Though this language was not ultimately enacted, it shows that the legislature clearly knew how to make dismissal mandatory. The language states that if the matter is not submitted for disciplinary review, the action must be dismissed. This is different from the lan-

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153. S. 1052; *see also* Esposito v. Specyalski, 844 A.2d 211, 218 (Conn. 2004) (explaining that a court must dismiss a case over which it cannot exercise subject matter jurisdiction).

154. *See supra* Part II.A.1.

155. Considine v. City of Waterbury, 905 A.2d 70, 81 (Conn. 2006) ("[T]he legislature is presumed to be aware of prior judicial decisions involving common-law rules." (quoting Chadha v. Charlotte Hungerford Hosp., 865 A.2d 1163, 1175 n.21 (Conn. 2005))).

156. S. 1052 (emphasis added).

guage adopted in subsection (c), which is more discretionary in nature.[157] If the legislature intended dismissal to be mandatory in subsection (c), it could have used the forceful language necessary to make it so. Its decision not to do so is indicative of legislative intent, and it should be given effect.[158]

2. Consideration of Subsection (c) in Light of Other Subsections

The penalties for filing a certificate in bad faith indicate that the legislature never intended for the sufficiency of the complaint to be measured until after discovery.[159] The statute states that the court cannot determine whether the certificate was filed in good faith until after the completion of discovery.[160]

If subsection (c) creates a jurisdictional hurdle, then, as stated above, the plaintiff must not merely submit a written opinion. Instead, the plaintiff must submit the opinion "required by subsection (a),"[161] which requires a detailed opinion.[162] However, the legislature has clearly indicated that an attorney's good faith in submitting a certificate is not to be measured until after discovery.[163] Since an attorney's good faith in certifying a complaint depends on the com-

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157. *See supra* Part II.A.1.

158. *See* Russello v. United States, 464 U.S. 16, 23 (1983) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (alteration in the original) (citations omitted) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972))). This principle extends to legislative history. When the Connecticut legislature considered mandatory language and then rejected it, it should be presumed to have acted intentionally and purposely. *See* United States v. Union Oil Co. of Cal., 369 F. Supp. 1289, 1292 (N.D. Cal. 1973) (noting that legislative intent "may be gleaned from several factors, including . . . successive drafts . . . of the legislation"), *rev'd on other grounds by* United States v. Union Oil. Co. of Cal., 549 F.2d 1271 (9th Cir. 1977).

159. *See* Vicenzi v. Abbott Terrace Health Ctr., Inc., No. CV075004413S, 2007 WL 3318198, at *2 (Conn. Super. Ct. Oct. 29, 2007) (noting that a majority of the Connecticut trial courts that have decided this issue have held that the sufficiency of the written opinion included with the good faith certificate is not tested with a motion to dismiss).

160. CONN. GEN. STAT. § 52-190a(a) (2007). The statute explicitly provides:

> If the court determines, after the completion of discovery, that such certificate was not made in good faith and that no justiciable issue was presented . . . the court upon motion or upon its own initiative shall impose upon the person who signed such certificate or a represented party, or both, an appropriate sanction . . . .

Id.

161. CONN. GEN. STAT. § 52-190a(c); *see supra* text accompanying notes 143-144.

162. *See id.* § 52-190a(a).

163. *Id.*

plaint's sufficiency, which can only be measured through discovery, the legislature could not have intended for the overall sufficiency of the opinion to be measured until discovery had taken place. As a result, if a sufficient opinion is not a jurisdictional hurdle under this statute, then failure to include one is not either. Rather, it is a defect that can be remedied. Given the language used in subsection (c), it would be absurd to assume that the legislature intended obtaining and filing the opinion to be a jurisdictional hurdle, but not obtaining and filing the detailed opinion required by subsection (a). Such an intent does not appear on the face of the statute, nor does it appear in the legislative history.

3. The Status of *LeConche v. Elligers*

If the legislature wanted to unambiguously make clear that the required certificate was a jurisdictional hurdle, it could have stated that *LeConche v. Elligers* is overruled. *LeConche* was a landmark case that stated that a certificate of good faith is not a jurisdictional prerequisite.[164] Yet, nowhere in the statute does the legislature state that section 52-190a overrules *LeConche*. Moreover, the case is not even mentioned in the legislative history.[165]

The mere inclusion of subsection (c) does not provide evidence of the legislature's intent to overrule *LeConche*. The legislature should be aware[166] of the strong presumption of subject matter jurisdiction.[167] This presumption becomes stronger given that "traditionally the Superior Court has had subject matter jurisdiction of a common law medical malpractice action."[168] In light of this, the

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164. LeConche v. Elligers, 579 A.2d 1 (Conn. 1990).

165. *Cf.* 29 U.S.C. § 794 (2000), which was amended in 1988 specifically to overrule the Supreme Court's decision in *Grove City College v. Bell*, 465 U.S. 555 (1984). S. REP. NO. 100-64, at 2 (1987), *as reprinted in* 1988 U.S.C.C.A.N. 3, 3-4 (stating that the amendment "was introduced on February 19, 1987, to overturn the Supreme Court's 1984 decision in *Grove City College v. Bell*, . . . and to restore the effectiveness and vitality of the four major civil rights statutes that prohibit discrimination in federally assisted programs." (footnote omitted)).

166. *See supra* notes 154-155 and accompanying text. While it is undoubtedly true that a statute rarely explicitly overrules a case, Connecticut's strong presumption in favor of jurisdiction requires the legislature to provide clear, unambiguous intent to curtail that jurisdiction. It is hard to imagine clearer intent than for the legislature to say "*LeConche v. Elligers* is hereby overruled" at least somewhere in the legislative history.

167. Donovan v. Sowell, 41 Conn. L. Rptr. 609, 611 (Conn. Super. Ct. 2006) (quoting Williams v. Comm'n on Human Rights & Opportunities, 777 A.2d 645, 651 (Conn. 2001)).

168. *Id.* at 611 (quoting *LeConche*, 579 A.2d at 5).

legislature must show a clear intent that a jurisdictional threshold has been created. The legislature failed to do so here.

Though in *Doe v. Priority Care, Inc.* the court concluded that the legislature intended to make changes to the regime set up by *LeConche*,[169] the court noted that this does not necessarily mean that it intended to overrule that case's central holding.[170] In reaching this conclusion, the court examined how earlier courts had used legislative history in their holdings.[171] The court noted that while one representative recognized that the 2005 amendment to section 52-190a "makes it much more difficult to bring a medical malpractice action in court,"[172] other legislators have taken different views. For example, one legislator noted that the purpose of the amendment was to focus on the issues in the case through use of an independent third party.[173] This purpose is still served if leave to amend a procedurally deficient complaint is granted.[174]

It is also important to note that statements of legislators during the legislative process are not always indications of legislative intent. Generally, "the statements and opinions of legislators uttered in a legislature are not appropriate sources of information from which to discover the meaning of the language of a statute passed by such body."[175] Although the legislative history of the 2005 amendments to section 52-190a contains a statement from Senator McDonald stating that "[t]he failure to attach such an opinion would require the court to dismiss the case,"[176] this is not the best way to divine the legislative intent. The intent of this particular legislator—who did not draft this statute—is not necessarily the same as the intent of the legislature as a whole. This is especially

169. Doe v. Priority Care, Inc., 933 A.2d 755, 759 (Conn. Super. Ct. 2007).

170. *Id.* at 755.

171. *Priority Care, Inc.*, 933 A.2d at 759 (examining the holdings of *Andrikis v. Phoenix Internal Medicine*, 41 Conn. L. Rptr. 222 (Conn. Super. Ct. 2006) and *Ouellette v. Brook Hollow Health Care Center*, 42 Conn. L. Rptr. 863 (Conn. Super. Ct. 2007)).

172. *Id.* (quoting *Andrikis*, 41 Conn. L. Rptr. at 225).

173. *Id.*

174. A complaint amended to include the required certificate can still be used to identify actionable conduct. The amendment will not eviscerate this purpose of the statute.

175. 73 AM. JUR. 2D *Statutes* § 89 (2001) (citing FTC v. Raladam Co., 283 U.S. 643, 650 (1931)). "It is true, at least generally, that statements made in debate cannot be used as aids to the construction of a statute." *Id.*

176. Peloso v. Walgreen E. Co., Inc., 42 Conn. L. Rptr. 838, 841 n.9 (Conn. Super. Ct. 2007).

true given that the language of the statute does not inevitably lead to the conclusion reached by Senator McDonald.[177]

III. Connecticut Courts Should Not Be Required to Dismiss All Procedurally Deficient Complaints Under Section 52-190a

This Part explores why Connecticut trial courts should not be obligated to dismiss all complaints lacking the required documentation. First, this Part analyzes issues of public policy. The first Section of this Part examines Connecticut's goal of ensuring that all cases are resolved on their merits. The next Section explores the negative implications of an interpretation of section 52-190a that mandates dismissal of all procedurally deficient complaints. This includes discussion of both the principle of access to justice and the goals of the tort system. Lastly, this Part explores common issues surrounding statutes similar to section 52-190a.

A. *Public Policy*

1. Ensuring that Cases are Resolved on their Merits

As a matter of policy, section 52-190a should not be interpreted as implicating a court's subject matter jurisdiction. In Connecticut, there is

> a "policy preference to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his day in court . . . The design of the rules of practice is both to facilitate business and to advance justice . . . Our practice does not favor the termination of proceedings without a determination of the merits of the controversy where that can be brought about with due regard to necessary rules of procedure."[178]

Dismissal of claims at the pleading stage allows potentially meritorious claims to be decided on procedural grounds. *Santorso v. Bristol Hospital* illustrates this point well.[179] It seems fairly clear that Lawrence Santorso was injured because of negligence on the part of the hospital. Notes were placed in his file that additional

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177. *See supra* Part II.A.1.

178. Greer v. Norbert, 42 Conn. L. Rptr. 806, 807 (Conn. Super. Ct. 2007) (quoting Evans v. Gen. Motors Corp., 893 A.2d 371, 387 (Conn. 2006) (omissions in original)).

179. Santorso v. Bristol Hosp., 42 Conn. L. Rptr. 724, 724 (Conn. Super. Ct. 2007).

tests were needed; yet, none were performed.[180] When Santorso filed his complaint, he failed to include the required certificate and written opinion.[181] If the court had concluded that section 52-190a mandated dismissal of all deficient complaints, his claim would have been dismissed, and he would have been denied his day in court.[182] Such a dismissal would fly in the face of Connecticut's settled policy of deciding cases on their merits.[183] Due regard for the rules of procedure does not mandate dismissal. Instead, leave to amend should be granted.

No legitimate policy aims would be served by the dismissal of claims similar to Lawrence Santorso's.[184] Section 52-190a was enacted to prevent the filing of frivolous claims.[185] However, dismissal of claims at the pleading stage does not accomplish this goal. It is certainly possible to have a viable claim yet not to be aware that additional documentation is required.[186] This is especially true given that the statute applies to pro se litigants as well as to those who are represented by counsel and also does not include a demand requirement. Allowing a plaintiff to amend his or her complaint does not conflict with the goals of the statute.

2. Any Gains from a Rigid Interpretation of Section 52-190a Are Outweighed by Negative Policy Implications

Certainly, dismissing all deficient complaints would help prevent lawyerly gamesmanship. This would create a hard and fast rule with no exceptions. A litigant who filed a deficient complaint would be unable to get more time to investigate his or her claim

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180. *Id.*

181. *Id.*

182. *Id.* at 725.

183. *Greer*, 42 Conn. L. Rptr. at 807 (quoting *Evans*, 893 A.2d at 387).

184. Although conservation of judicial resources is certainly a valid policy goal, Cavaliere v. Olmsted, 909 A.2d 52, 55 (Conn. App. Ct. 2006) (noting the policy of conserving judicial resources), allowing Santorso to amend his complaint does little to tax the system. Santorso was ordered to amend his complaint "to include the good faith certificate and the opinion of a health care professional similar to each defendant within a period of thirty days." *Santorso*, 42 Conn. L. Rptr. at 726. Such an action does not unduly burden the judicial system. Moreover, any drain on the resources of the court that might be relieved by mandating dismissal is outweighed by other negative policy implications.

185. Bruttomesso v. Ne. Conn. Sexual Assault Crisis Servs., Inc., 698 A.2d 795, 802 (Conn. 1997).

186. *See Santorso*, 42 Conn. L. Rptr. at 724 (stating that Santorso, by his own admission, failed to file the required certificate and written opinion).

and amend later if necessary. That rule would amount to a value judgment—it is better to dismiss potentially legitimate claims so as to prevent potentially frivolous claims from proceeding. However, any gain that might stem from such a rule would be offset by its consequences because it would require our legal system to turn a blind eye to principles like access to justice and the goals of the tort system.

a. Access to justice

The courts have traditionally been the place where harmed individuals can seek redress.[187] However, procedural booby-traps such as section 52-190a form a barrier to the court system.[188] The right to sue for medical malpractice is "a common-law right given to citizens to redress their grievances in the only practical forum available; namely, the courts. Before that right is circumscribed it must be absolutely clear that the legislature intended to curtail its exercise."[189] Connecticut is understandably reluctant to take the right to seek redress away from its citizens.[190] However, interpreting the certificate of good faith and written opinion as jurisdictional has the very effect of forming a barrier to citizens seeking redress for medical negligence in Connecticut courts.

In a similar vein, the Supreme Court of Oklahoma in *Zeier v. Zimmer, Inc.* struck down Oklahoma's affidavit of merit statute both as "an unconstitutional monetary barrier" to court access and as an "unconstitutional special law."[191] The court found that the "statutorily created requirement for the payment of professional services as a prerequisite to the filing of a . . . medical malpractice [claim] violates the court access provisions guaranteed by art. 2, [section] 6 of the Oklahoma Constitution."[192] That constitutional provision provides that "[t]he courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, de-

187. *See* Gentile v. Altermatt, 363 A.2d 1, 11 (Conn. 1975) (noting that "the right of redress for injury is constitutional in its nature"). This right is reflected in the open courts provision of the Connecticut Constitution. CONN. CONST. art. 1, § 10. Almost all (if not all) other states contain a similar provision. *See, e.g.*, OKLA. CONST. art. 2, § 6.

188. *See infra* text accompanying notes 191-196.

189. Cunningham v. Talmadge Park, Inc., 43 Conn. L. Rptr. 400, 401-02 (Conn. Super. Ct. 2007).

190. *See supra* note 183 and accompanying text.

191. Zeier v. Zimmer Inc., 152 P.3d 861, 862 (Okla. 2006).

192. *Id.* at 869.

lay, or prejudice."[193] The court noted that out of all possible litigants, medical malpractice plaintiffs are singled out and forced to procure an expert opinion before there is any adjudication of their rights.[194] The affidavit costs anywhere between five hundred and five thousand dollars.[195] Because of this, the court held that since the doors to the courthouse are closed to those who are financially unable to procure an affidavit, the statute creates an unconstitutional monetary barrier.[196]

Article 1, section 10 of the Connecticut Constitution contains a virtually identical provision to that of Oklahoma.[197] As a result, it certainly is arguable that section 52-190a violates Article 1, section 10 of the Connecticut Constitution as well by requiring plaintiffs to pay for a medical opinion. However, even if this statute does not violate the Connecticut Constitution, it still is problematic. As the costs of litigation have risen, malpractice attorneys have become increasingly selective about the cases they take on.[198] Further, because many injuries are worth less than the costs of litigating with a malpractice attorney, many injured parties seek relief by litigating pro se. Statutes like section 52-190a make it virtually impossible for a pro se litigant to have her case resolved on the merits. Though "it is the established policy of the Connecticut courts to be solicitous of pro se litigants,"[199] the statute contains no exception for them.[200] As a result, if the certificate is interpreted as a prerequisite to subject matter jurisdiction, many litigants will be denied access to justice because of this pleading requirement.

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193. OKLA. CONST. art. 2, § 6.

194. *Zeier*, 152 P.3d at 872-73.

195. *Id.* at 873.

196. *Id.*

197. CONN. CONST. art. 1, § 10 ("All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.").

198. *See* Christopher S. Kozak, *A Review of Federal Malpractice Tort Reform Alternatives*, 19 SETON HALL LEGIS. J. 599, 599 n.1 (1995) (noting the increased costs of filing a medical malpractice suit).

199. Traylor v. Awwa, No. 5001159, 2007 WL 1748189, at *2 (Conn. Super. Ct. June 1, 2007) (quoting Solomon v. Conn. Med. Examining Bd., 859 A.2d 932, 938 (Conn. App. 2004)).

200. CONN. GEN. STAT. § 52-190a (2007).

b. The goals of the tort system

The two main goals of the tort system are compensation for victims and deterrence of negligent behavior.[201] Interpretation of section 52-190a as creating a hurdle for the court's subject matter jurisdiction works against these two goals.[202]

Requiring dismissal for deficient complaints denies compensation to victims as a result of a procedural technicality, not on the merits of their cases.[203] Litigants who lack the resources to hire effective counsel or who choose to proceed pro se risk dismissal if they are not aware of section 52-190a. Overall, statutes like this "prevent meritorious medical malpractice actions from being filed,"[204] either because the plaintiff is unaware of the requirement or because they require extensive pre-trial discovery to get the facts needed for an expert to write an opinion.[205] Thus, the injured parties must overcome a significant barrier when seeking compensation for their injuries.

If failure to include the written opinion and good faith certificate requires dismissal, then the Connecticut legislature has removed a deterrent to negligent behavior. The primary mechanism for holding doctors liable for professional negligence is the medical malpractice system.[206] However, if meritorious claims are dismissed on procedural grounds, then negligent doctors will not be identified. Identification of both negligent behavior and negligent doctors is necessary to enhance quality of patient care.[207] Medical malpractice suits serve an important function: they place doctors on

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201. Adam J. Winters, *Where There's Smoke, Is There Fire? An Empirical Analysis of the Tort Crisis in Illinois*, 56 DEPAUL L. REV. 1347, 1349 (2007) ("Most scholars will agree that the tort system has two primary goals: '(1) to *compensate* persons who are injured through the negligence of others and (2) to *deter* future negligent behavior,' both in the specific defendant and in others." (citation omitted)).

202. A contrary interpretation would allow amendment of procedurally defective complaints. Thus, potentially meritorious claims would be allowed to proceed to trial. If truly meritorious, the plaintiff would prevail and the defendant would be held liable, thus satisfying the two goals of the tort system. Consequently, if a claim is brought that lacks the statutorily required documentation, a judge should order the claim amended. If the plaintiff is unable to obtain certification, then the claim is frivolous and should be dismissed.

203. Zeier v. Zimmer, Inc., 152 P.3d 861, 869 (Okla. 2006).

204. *Id.*

205. *Id.*

206. Katharine Van Tassel, *Hospital Peer Review Standards and Due Process: Moving From Tort Doctrine Toward Contract Principles Based on Clinical Practice Guidelines*, 36 SETON HALL L. REV. 1179, 1181 (2006) ("The medical malpractice system is one of the major vehicles of accountability for medical errors.").

207. *Id.* at 1182.

notice that certain conduct is actionable, and remind doctors that the threat of suit is always present.

Any harm caused by allowing amendment of deficient complaints is de minimis when compared to the gains created by allowing claims to be resolved on their merits. The public interest in allowing litigants to have their day in court supersedes any inefficiency and potential for gamesmanship. Ensuring that litigants have access to justice furthers the goals of the tort system by allowing cases to be resolved on their merits and by deterring negligent behavior.

B. *The Approaches of Other States*

Many statutes address what states perceive as a medical malpractice crisis.[208] Some statutes place caps on damages; others require presentation of a claim to a review board; and still others place caps on malpractice insurance.[209] Many states have also taken approaches similar to Connecticut's by requiring certificates of good faith and affidavits.[210] However, unlike section 52-190a, some of these statutes are more artfully drawn and protect the interests of all parties.[211] They illustrate that similar language can be interpreted as this Note suggests[212] and show the dangers of a contrary interpretation.[213]

1. Minnesota

Minnesota's affidavit of merit statute requires the submission of two affidavits.[214] First, the plaintiff's attorney must draft an affidavit of expert review stating that

> [t]he facts of the case have been reviewed by the plaintiff's attorney with an expert whose qualifications provide a reasonable expectation that the expert's opinions could be admissible at trial and that, in the opinion of this expert, one or more defendants

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208. *See supra* note 95.

209. JOSEPH H. KING, JR., THE LAW OF MEDICAL MALPRACTICE IN A NUTSHELL 320-22 (2d ed. 1986).

210. *See, e.g.*, 735 ILL. COMP. STAT. 5/2-622 (West 2003), *invalidated by* Best v. Taylor Mach. Works, 689 N.E.2d 1057 (Ill. 1997); MINN. STAT. § 145.682 (2002); N.J. STAT. ANN. § 2A:53A-27 (West 2000).

211. *See, e.g.*, MINN. STAT. § 145.682.

212. *See, e.g.*, 735 ILL. COMP. STAT. 5/2-622.

213. *See, e.g.*, N.J. STAT. ANN. § 2A:53A-27.

214. MINN. STAT. § 145.682.

> deviated from the applicable standard of care and by that action caused injury to the plaintiff.[215]

However, if the statute of limitations made it unreasonable to acquire the affidavit before filing suit, the plaintiff has ninety days from the date of service of the summons and complaint to serve the affidavit on the defendant or the defendant's counsel.[216] The second affidavit is an identification of the experts who will be called to testify, what they will say, and a summation of how they arrived at that conclusion.[217]

Subdivision 6 of the statute addresses the penalties for noncompliance.[218] It states that failure to submit the first affidavit "within 60 days after demand for the affidavit results, upon motion, in mandatory dismissal with prejudice of each cause of action as to which expert testimony is necessary to establish a prima facie case."[219] Similarly, if the plaintiff fails to file the second affidavit, the defendant can move for dismissal of all causes of action requiring expert testimony to state a claim.[220] However, the operation of this provision is limited by clause (c), which states that if the second affidavit is submitted but is noncompliant due to "deficiencies in the affidavit," the complaint will be dismissed with prejudice as long as

> (1) the motion to dismiss the action identifies the claimed deficiencies in the affidavit or answers to interrogatories; (2) the time for hearing the motion is at least 45 days from the date of service of the motion; and (3) before the hearing on the motion, the plaintiff does not serve upon the defendant an amended affidavit or answers to interrogatories that correct the claimed deficiencies.[221]

Connecticut trial courts should be mindful of the safeguards contained in the Minnesota statute. Under that statute, there is little risk of creating a trap for the unwary because failure to submit the first affidavit does not result in dismissal until sixty days have

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215. *Id.* § 145.682(3)(a).
216. *Id.* § 145.682(3)(b).
217. *Id.* § 145.682(4)(a).
218. *Id.* § 145.682(6).
219. *Id.* § 145.682(6)(a).
220. *Id.* § 145.682(6)(b).
221. *Id.* § 145.682(6)(c). The danger posed by section 52-190a is that an unsophisticated, honestly injured litigant filing a medical malpractice action may be unaware of the statute. A demand requirement quells this danger, as dismissal cannot occur until the plaintiff has at least been made aware of this requirement.

passed since the demand.[222] This statute ensures that the plaintiff is aware of the affidavit requirement. Although there have been controversies surrounding the interpretation of the statute,[223] the statute is effective at permitting meritorious yet procedurally deficient claims to proceed to trial. This fact alone demonstrates the statute's superiority to Connecticut's statute when it is interpreted as requiring certification as a prerequisite to subject matter jurisdiction.[224]

2. Illinois

Illinois's certificate of merit statute, before it was found unconstitutional, contained language identical to that used in Connecticut.[225] The statute stated that "the failure [of the plaintiff] to file a certificate required by this Section shall be grounds for dismissal under Section 2-619."[226] In holding that this language does not mandate dismissal with prejudice for failure to include the required affidavit, the Illinois Supreme Court noted that to hold conversely "would be a triumph of form over substance. It would elevate a pleading requirement designed to reduce frivolous lawsuits into a substantive defense forever barring plaintiffs who initially fail to comply with its terms."[227]

In concluding, the court noted that the trial court has the discretion to grant leave to amend the complaint.[228] This approach strikes the balance toward which Connecticut should strive. Instead of creating a hard and fast rule, the Illinois legislature gave Illinois trial courts the discretion to determine whether a complaint should

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222. *Id.* § 145.682(6).

223. *See generally* Jason Leo, *Torts—Medical Malpractice: The Legislature's Attempt to Prevent Cases Without Merit Denies Valid Claims*, 27 WM. MITCHELL L. REV. 1399, 1406 (2000).

224. The fact that Minnesota included a demand requirement is telling. Though they have specified a harsh remedy, it will not be imposed until the plaintiff is at least aware of the statutory requirements. Although the Connecticut courts would be unable to read a demand requirement into the statute, allowing amendment of procedurally deficient complaints would have the same effect. It would ensure that no claims are dismissed at least until the plaintiff is aware that documentation is needed.

225. 735 ILL. COMP. STAT. 5/2-622 (West 2003), *invalidated by* Best v. Taylor Mach. Works, 689 N.E.2d 1057 (Ill. 1997).

226. *Id.*

227. McCastle v. Sheinkop, 520 N.E.2d 293, 296 (Ill. 1988).

228. *Id.*

be dismissed,[229] or whether leave to amend should be granted.[230] Connecticut trial courts should be given the same discretion.

3. New Jersey

The New Jersey affidavit of merit statute has caused a great deal of confusion and has resulted in the dismissal of many meritorious claims.[231] Interpreting Connecticut's statute in the same manner that the New Jersey trial courts have interpreted New Jersey's will result in similar problems. Rather than going down this road, Connecticut courts should learn from the problems New Jersey courts confronted in interpreting the statute of their state.

The New Jersey statute reads:

> In any action for damages . . . resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation, the plaintiff shall, within 60 days following the date of filing of the answer to the complaint by the defendant, provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill, or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices. The court may grant no more than one additional period, not to exceed 60 days, to file the affidavit pursuant to this section, upon a finding of good cause.[232]

If a plaintiff fails to provide the required documentation, "it shall be deemed a failure to state a cause of action."[233]

Critics argued that although this statute was intended to identify and dismiss frivolous malpractice cases, it "has evolved into a deathtrap for the unwary and has resulted in a tidal wave of contradictory decisions by the trial and appellate courts."[234] New Jersey courts have strictly construed the statutory requirements, dismissing

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229. Illinois courts also can choose whether the claim should be dismissed with prejudice. *Id.*

230. *Id.*

231. Brown, *supra* note 100, at 427 (discussing the dismissal of valid claims).

232. N.J. STAT. ANN. § 2A:53A-27 (West 2000).

233. *Id.* § 2A:53A-29. This circumstance results in the dismissal of the plaintiff's complaint with prejudice "[a]bsent extraordinary circumstances." Cornblatt v. Barow, 708 A.2d 401, 415 (N.J. 1998).

234. Brown, *supra* note 100, at 427; *see also* Stroub, *supra* note 100, at 279 (noting that this statute has operated as a protocol minefield). Stroub also enumerates a number of cases that have been dismissed as a result of "technical non-compliance." Stroub, *supra* note 100, at 302-03.

complaints for the slightest deficiencies in the affidavit of merit.[235] For example, in *Medeiros v. O'Donnell & Naccarato, Inc.*, the trial court dismissed the case with prejudice because the affidavit referred to the engineering firm as the "defendant," rather than using its name, as the statute prescribed.[236] Though the Appellate Division of the Superior Court reversed using the doctrine of substantial compliance,[237] this is still problematic.

Dismissal of potentially meritorious claims for the slightest procedural defects is bad policy.[238] It inhibits a citizen's access to justice and undermines the goals of the tort system. A court should not have to resort to the substantial compliance doctrine to save claims such as these. Furthermore, it is certainly possible, if not likely, that similarly meritorious cases have been dismissed and were not revived by substantial compliance.[239] Likewise it is impossible to determine "how many defendants have used the affidavit of merit statute as a shield and a sword, being relieved from potential liability by motioning to dismiss cases against them based on that technical noncompliance."[240] Interpreting Connecticut's certificate of merit statute liberally will allow the trial courts to bypass these issues. As was seen in New Jersey,[241] such an interpretation is perfectly valid.

CONCLUSION

Connecticut trial courts have borne the brunt of the Connecticut legislature's sloppy drafting. In the wake of the 2005 amendments to section 52-190a, Connecticut trial courts are divided. Since further legislative guidance will likely not be forthcoming, the courts will be forced to interpret the language as it currently is written. The language and legislative history show that the Connecticut legislature intended for courts to adopt a liberal interpretation of this statute, giving judges discretion to order amendment of deficient claims. However, this is only part of the story. Examination of public policy shows that a rigid interpretation of section 52-190a is imprudent.

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235. *See* Medeiros v. O'Donnell & Naccarato, Inc., 790 A.2d 969, 970 (N.J. Super. Ct. App. Div. 2002).

236. *Id.* at 971.

237. *Id.* at 973-74.

238. *See* Greer v. Norbert, 42 Conn. L. Rptr. 806, 807 (Conn. Super. Ct. 2007) (quoting Evans v. Gen. Motors Corp., 893 A.2d 371, 387 (Conn. 2006)).

239. Stroub, *supra* note 100, at 302-03.

240. *Id.* at 303.

241. N.J. STAT. ANN. § 2A:53A-27 (West 2000).

Society loses when claims are decided on procedural grounds and litigants are denied their day in court. Our society values access to the courts. In fact, there are constitutional provisions in most states requiring it. Yet, a rigid interpretation of section 52-190a would eviscerate this cherished right. The costs of obtaining an opinion from a medical professional make it exceedingly difficult for low-income plaintiffs to have their cases decided on the merits. Further, the rising costs of medical malpractice lawsuits make attorneys reluctant to accept low-value claims. This forces many injured parties to litigate pro se, ignorant of the rules, and without an attorney to guide them through what has been described as a procedural minefield.[242] If Connecticut courts are serious about ensuring that disputes are decided on their merits and that all individuals have access to the courts, a liberal interpretation of section 52-190a should be adopted.

Connecticut would be wise to learn from the experiences of other states. New Jersey's affidavit of merit statute has sparked a great deal of litigation and has resulted in the dismissal of many claims. Eventually, the New Jersey courts had to adopt the substantial compliance doctrine to save meritorious complaints and ameliorate the havoc this statute was wreaking on their medical malpractice system.

While not a picture of perfection, Minnesota's affidavit of merit statute helps to protect unsophisticated litigants. The demand requirement ensures that litigants are aware of the need to procure affidavits of merit to prevent dismissal of their claims. By allowing amendment of procedurally defective complaints, Connecticut trial courts can achieve the same effect.

Such an interpretation has been reached by Illinois in the face of virtually identical language. In noting the disastrous implications of a rigid interpretation, the Illinois Supreme Court adopted a rule that allows the trial courts to determine whether leave to amend should be granted. Adopting such a rule in Connecticut would prevent frivolous lawsuits from proceeding, while simultaneously ensuring that meritorious—yet temporarily procedurally deficient—complaints may proceed. This should be the goal of any state's rules of procedure.

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242. *See* Stroub, *supra* note 100, at 279.